SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 343

CLARENCE J. THOMPSON,

Petitioner

vs.

THE STATE OF GEORGIA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

THOMAS HOWELL SCOTT,
Counsel for Petitioner.

ROBERT B. BLACKBURN,
H. A. ALLEN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1942

No. 343

CLARENCE J. THOMPSON,
Petitioner in Certiorari,

vs.

THE STATE OF GEORGIA.
Defendant in Certiorari.

PETITION OF CLARENCE J. THOMPSON FOR WRIT OF CERTIORARI TO COURT OF APPEALS OF THE STATE OF GEORGIA TO REVIEW, CORRECT AND REVERSE THE SAID COURT'S DECISION OF APRIL 3, 1942 VACATING, ON MOTION FOR REHEARING BY THE STATE, ITS JUDGMENT OF JAN. 16, 1942—AND RENDERING OPINION AFFIRMING JUDGMENT OF LOWER COURT. PETITION TO SUPREME COURT OF GEORGIA FOR CERTIORARI * * * PETITION DENIED MAY 21, 1942—MOTION TO RECONSIDER DENIAL WRIT OF CERTIORARI DENIED JUNE 16, 1942.

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

UNITED STATES OF AMERICA,
State of Georgia,
County of Fulton.

MAY IT PLEASE THE COURT:

Clarence J. Thompson files this his petition for writ of certiorari to the Court of Appeals of the State of Georgia for the purpose of having reviewed, corrected and reversed a decision of the Court of Appeals of Georgia, entered

April 3, 1942, vacating at the request of the State, on motion for rehearing, a former judgment of said court, of date January 16, 1942, and rendering opinion affirming the judgment of the lower court. The said decision is reported as *Thompson* v. *The State*, reported in: Southeastern 19. (2nd Series.) Page 777.

The petition of Clarence J. Thompson to the Supreme Court of Georgia for writ of certiorari to the Court of Appeals of Georgia was denied on May 21, 1942, and the motion of Clarence J. Thompson requesting the Supreme Court of Georgia to reconsider and review its action in denying the petition of Clarence J. Thompson for certiorari was denied on June 16, 1942.

The Court of Appeals of Georgia is therefore the highest court of the State of Georgia in which a decision in this case could be had.

Part I.

Summary and Short Statement of the Matter Involved.

1. On the 17th day of January, 1941, an indictment was returned against petitioner, Clarence J. Thompson, by the Grand Jury of Fulton County, Georgia. The indictment as returned being in three counts.

Count one of the indictment charging and accusing petitioner with the offense of misdemeanor (defrauding the City of Atlanta) for that the accused in the County of Fulton and State of Georgia on the first of November, 1940, with force and arms, being then an inspector employed by the city of Atlanta in the Water Works Department, did conspire with Ben I. Tessler to defraud the city of Atlanta, a municipal corporation, out of a large amount of water of the value of $1,033.36, and the property of said City of Atlanta in the following manner:

The City of Atlanta was engaged in selling and supplying water to consumers. The water sold and supplied to

its customers is paid for on the basis of cubic feet, supplied as measured by the water meter of the City of Atlanta at established rates, the indictment charging that the accused conspired with Ben I. Tessler and did enter into an agreement with Tessler to the effect that for a monetary compensation, consisting of one-half of the amount saved by Tessler, he, the accused, would arrange for his water bills to be less than they would be for the true amount of water used. That in conformity with said agreement, accused did change and alter the meter located at the premises of Tessler in some manner unknown to the grand jurors and that as a result of the fraudulent scheme the City of Atlanta has actually been defrauded out of water of the value of $1,033.36, contrary to the laws of said State, the good order, peace and dignity thereof.

The other two counts in the indictment were in language the same, except as to persons and amounts (R. 7).

2. Before arraignment and before waiver of arraignment and plea of not guilty, Clarence J. Thompson (petitioner), filed his general demurrer to the indictment as returned, demurring generally and separately to each count of the indictment—contending that the allegations in the indictment charged no offense, and for other reasons set forth, contended that the indictment and each of the three counts in the indictment should be quashed (R. 12).

3. That on the 23rd day of January, 1941, the demurrer as filed to the indictment against petitioner, came on to be heard before a presiding judge of the Superior Court of Fulton County, Georgia, Atlanta Circuit, and the demurrer of petition was by the court overruled (R. 17).

4. Thereafter, petitioner being dissatisfied with the judgment of the court as entered overruling the demurrer to the indictment, excepted to the order of the court, and on the 15th day of February, 1941, filed exceptions *pendente*

lite and presented the same to the court in accordance with the rules of practice and procedure in such cases provided and the same were certified to and ordered filed as a part of the record in said case (R. 17).

5. Thereafter, the cause entitled "The State of Georgia vs. Clarence J. Thompson," came on to be tried in the Superior Court of Fulton County, Georgia, Atlanta Circuit, upon the indictment as set forth, and Clarence J. Thompson, petitioner, entered his plea of not guilty, and the case proceeding to trial before a jury duly impaneled, and upon evidence being adduced, petitioner was found guilty as charged upon each of the three counts, whereupon, the verdict as returned was made the judgment of the court and petitioner was sentenced to serve the period of twelve months on each of the counts, the service to run consecutively (R. 19-20).

6. Petitioner being dissatisfied with the verdict and judgment as entered, in accordance with the rules of practice and procedure in such cases provided, on the 28th day of January, 1941, filed in said Superior Court of Fulton County, Georgia, Atlanta Circuit, a motion for new trial and on the 14th day of June, 1941, the motion for new trial was amended.

7. The motion for new trial as amended coming on to be heard before the presiding judge of the Superior Court of Fulton County, Atlanta Circuit, under and in accordance with the rules of practice and procedure in said court as made and provided by law in such cases and the motion for new trial as amended was by the court overruled (R. 22).

8. To the order of the court denying petitioner's motion for new trial, petitioner excepted and assigned error, and within the time prescribed by law, a bill of exceptions

was presented assigning error upon the judgment overruling the motion for new trial and likewise assigning error on exceptions *pendente lite* to the judgment of the court overruling the demurrer of petitioner to the indictment as returned against him and, upon the writ of error, the case was appealed to the Court of Appeals of Georgia (R. 1-7).

9. The case coming on to be heard in the Court of Appeals of Georgia upon the assignment of error as made, the Court of Appeals of Georgia on January 16, 1942, rendered judgment in the case entitled "Clarence J. Thompson, Plaintiff In Error vs. The State of Georgia, Defendant In Error", reversing the judgment of the lower court because the court erred in not quashing the indictment (R. 22).

10. Thereafter, the State of Georgia, as defendant in error in the stated case, filed a motion for rehearing on Jan. 24, 1942.

11. Clarence J. Thompson, in response to the motion for rehearing, filed a motion in the Court of Appeals of Georgia to dismiss the motion for rehearing as filed by the State of Georgia, contending in said motion that the Court of Appeals of Georgia did not have authority as a matter of law to entertain a motion for rehearing in a criminal case and that, in criminal cases, the state did not have the right to move for a rehearing. That the State in such cases was not a party and could not be legally held to be a party for the purpose of appeal (R. 27).

Thereafter the Court of Appeals of Georgia entertained the motion for rehearing and issued rule *nisi* directed to counsel for Clarence J. Thompson to show cause at a stated time why the judgment of the court of January 16, 1942 should not be vacated (R. 32).

12. Thereafter on April 3, 1942, the Court of Appeals of Georgia entered judgment reciting that upon consideration of the motion for rehearing in the case of *Clarence J. Thompson* v. *State*, it was ordered that the judgment of the Court of Appeals of Georgia rendered therein on January 16, 1942, be vacated and the opinion be withdrawn from the files, and on the same date, to-wit, April 3, 1942, the Court of Appeals of Georgia in the same case designated as No. 29257, rendered a decision and judgment affirming the decision of the lower court in overruling the demurrer of Clarence J. Thompson to the indictment as returned against him in the Superior Court of Fulton County, Georgia, Atlanta Circuit, and likewise affirming the verdict and the judgment of the Superior Court of Fulton County, Georgia, Atlanta Circuit, in finding Clarence J. Thompson guilty of the offense as charged and holding further in said opinion and judgment that the State could file a motion for rehearing and in said judgment, overruled the motion of Clarence J. Thompson, the plaintiff in error in the stated case, to strike the motion for rehearing as filed by the State of Georgia (R. 47).

13. The judgment of the Court of Appeals of Georgia affirming the judgment of the lower court was by a divided bench. His Honor, Associate Justice Gardner dissenting (R. 41).

14. Thereafter, petitioner, Clarence J. Thompson, being dissatisfied with the judgment of the Court of Appeals of Georgia as rendered in the case styled "Clarence J. Thompson, Plaintiff in Error vs. State of Georgia, Defendant in Error," designated as No. 29257, gave written notice to the Clerk of the Court of Appeals of Georgia, of his intention to apply to the Supreme Court of Georgia for a writ of certiorari within thirty days from the filing of the judgment of the Court of Appeals of Georgia. This notice being given on the 6th of April, 1942 (R. 48).

15. Thereafter, petitioner, Clarence J. Thompson, on the 2nd day of May, 1942, prepared and filed with the Clerk of the Supreme Court of Georgia a petition, the issuance of the writ of certiorari within the time allowed by law to review and reverse the decision of the Court of Appeals of Georgia, contending in said petition for certiorari that the decision of the Court of Appeals was without warrant and lawful authority, and that said decision contravened constitutional law (Exhibit "B").

16. On May 2, 1942, the Clerk of the Court of Appeals of Georgia was officially notified by the Clerk of the Supreme Court of Georgia that there had been filed an application to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of *C. J. Thompson* v. *The State of Georgia* under case No. 14210 (R. 48).

17. Thereafter, to-wit, on May 21, 1942, the Supreme Court of Georgia in the case of *C. J. Thompson* v. *The State*, the Supreme Court of Georgia upon considering the application for certiorari, filed, to review the judgment of the Court of Appeals in the case stated, ordered that the krit be denied—no opinion (R. 49).

18. Thereafter, petitioner filed with the Clerk of the Supreme Court of Georgia, a motion directed to the Supreme Court of Georgia in the case of *C. J. Thompson* v. *The State*, requesting the Supreme Court to reconsider its judgment in denying the application for certiorari in the stated case.

19. The motion to reconsider coming on to be heard, the Supreme Court of Georgia on June 16, 1942, in the case of *C. J. Thompson* v. *The State* entered order reciting—Upon consideration of the motion for a reconsideration filed in this case, it is ordered that it be denied—as will be shown by certified copy of the order as passed by the Supreme Court of Georgia, as hereto attached and made a part of this petition for certiorari, the same marked Exhibit "C" reference to which is prayed.

PART II.

Basis of Supreme Court's Jurisdiction to Review Judgment. Questions Involved.

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code (U. S. C. A. Title 28, Section 344 (B), which reads as follows:

> "It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of the State where a decision could be had where is drawn to question the validity of a treaty or statute of the United States or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the constitution, treaties or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied."

1. Petitioner assigns as error, the judgment of the Court of Appeals of Georgia, dated April 3, 1942, vacating the judgment entered by it in the same case, the judgment vacated being entered of date January 16, 1942, in which judgment the Court of Appeals reversed the judgment of the lower court—Because the Court erred in not quashing the indictment.

Petitioner contends that the judgment of the Court of Appeals of Georgia, of date, January 16, 1942, reversing the judgment of the lower court—*Because*—The *court erred* in *not quashing the* indictment—was a judgment final in its nature and was a disposition of the case. That

upon entering the judgment quashing the indictment, the court lost entire and complete jurisdiction of the subject matter and the person. The case being one that involved crime.

2. Petitioner contends further that the effort to recall and vacate the solemn and final judgment was without warrant or authority and was in, and of itself, in contravention of and in violation of Amendment 8, Article 5 of the Constitution of the United States which provides:

> "That no person shall be subject for the same offense, to be twice put in jeopardy."

3. Petitioner further contends that the last judgment of the Court of Appeals of the State of Georgia rendered on the 3rd day of April, 1942, was contrary to and in contravention of the 14th Amendment of the Constitution of the United States which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law."

4. Petitioner contends further that the judgment complained of was in conflict with and in violation of the Constitution of the State of Georgia in that it contravened Article 1—Section 1, paragraph 8 of said Constitution, which provides:

> "No person shall be put in jeopardy of life or liberty more than once for the same offense, save only on his or her motion for a new trial, or in case of mistrial."

5. Petitioner contends further that the judgment complained of violated Article 1—Section 1—Paragraph 3 of the Constitution of the State of Georgia which provides:

> "That no person shall be deprived of life, liberty or property without due process of law."

Petitioner shows that this decision of the Court of Appeals of the State of Georgia necessarily involved a construction of the 14th Amendment of the Constitution of the United States and of Article 1, Section 1, Paragraph 3, of the Constitution of Georgia and was contrary thereto, because the term "due process of law" means that a defendant in every criminal case is to be tried as every other defendant is tried in accordance with the law of the land in the State where he is charged with crime and petitioner contends that the last decision of the Court of Appeals of the State of Georgia deprived him of being tried in accordance with the law of the land in the State where he is charged with crime, because Section 1—Article 1—paragraph 8 of the Constitution of the State of Georgia provides:

> "No person shall be put in jeopardy of life or liberty more than once for the same offense, save only on his or her motion for a new trial after conviction, or in case of a mistrial."

Petitioner shows that in the trial court, he had filed his demurrer to the indictment at the proper time and it had been passed upon by the trial court at the proper time and in the proper way, and had assigned error thereon in the Court of Appeals and when the Court of Appeals rendered its first judgment in said case, it held and decided: That the trial court erred in overruling the demurrer and further held and decided that it was error to overrule the same, and did reverse the trial court and held that the demurrer should have been sustained, and the indictment quashed, which first judgment of the Court of Appeals did have the effect of deciding that the indictment was invalid and discharging the defendant thus ending the case.

The case then pending against him came to an end and was fully adjudicated by a court of competent jurisdiction—and the State was without the right of appeal.

6. The attempt on the part of the same judicatory to take back what it had spoken was an arbitrary exercise of power, with which it was not clothed and cannot be held as of binding force.

By the judgment of the Court of Appeals of Georgia, of date April 3, 1942, the judgment of the same court and between the same parties of date, January 16, 1942, was reversed.

Under the judgment of January 16, 1942, petitioner was acquitted, by the quashing of the indictment.

By the judgment of April 3, 1942, the freedom vouchsafed to him was arbitrarily recalled, and he was twice put into jeopardy for the same offense and he likewise was deprived of his liberty without due process of law by a decision that was invoked on a motion for rehearing, filed by the State in a criminal case, in violation, not only of constitutional provisions of the Constitution of the United States and the State of Georgia, but also in defiance of, and in an arbitrary failure to recognize an unbroken line of decisions by the United States Supreme Court and the Supreme Court of Georgia, as well as other courts of last resort for over one hundred years.

7. The decision of the Court of Appeals complained of expressly, overruled the motion of Clarence J. Thompson to strike the motion for rehearing as filed by the State in the instant case.

The Court of Appeals of Georgia in rendering its opinion, refused to follow the unbroken line of authorities on the subject, including *United States* v. *Sanges,* 144 U. S. 310; *The State of Georgia* v. *William Jones,* 7th Georgia, Supreme Court Reports, Page 422 and authorities therein cited. *State* v. *Lovin,* 25th Ga. 311. *State of Georgia* v. *Johnson,* 61st Georgia 641. *Mayor and Council of Hawkinsville* v. *Etheridge,* 96 Ga. 326. *Eves* v. *State,* 113th Ga.

750, in such a manner as to create a presumption that to be so unreasonable and arbitrary as to amount to a denial of due process of law, and of the equal protection of the law and in violation of the provisions of the Constitution of the United States and the Constitution of the State of Georgia as hereinbefore set forth.

8. Petitioner contends that up to the time at which the State of Georgia filed its motion for rehearing in the Court of Appeals of Georgia to review its judgment quashing the indictment in the case of *Clarence J. Thompson* v. *The State*, none of the assignments of errors as herein set forth could have been made.

9. Petitioner contends that the violation of the provisions of the Federal and State Constitutions could not have been invoked until the Court of Appeals of Georgia rendered this judgment of April 3, 1942, in which judgment the Court of Appeals of Georgia for the first time, contravened constitutional law by entertaining and granting a motion for a rehearing in the criminal case, and vacated a solemn judgment of acquittal, in favor of petitioner and by withdrawing a previous opinion in the same case and rendering another opinion in contradiction of the first; and by the last opinion, placing petitioner in jeopardy for the same offense the second time, depriving him of his liberty without due process of law.

10. Petitioner contends that the decision complained of, in itself, without resorting to matter dehors the record, sets forth reasons and conclusions which in of themselves, contravenes the provisions of the State and Federal Constitutions as noted; and petitioner contends that the decision of the Court of Appeals of Georgia of April 3, 1942, is void on its face and that the Court of Appeals of Georgia in rendering such decision, committed error of a nature requiring the grant of certiorari.

11. The assignments of error upon the opinion of the Court of Appeals of date, April 3, 1942 (which decision was rendered upon a motion for rehearing on behalf of the State) were made in the petition for certiorari addressed to The Supreme Court of Georgia, for the purpose of reviewing and reversing the judgment complained of, as will fully appear by a certified copy of the petition for certiorari to the Supreme Court of Georgia, which is hereto attached and made a part of this petition, the same being marked Exhibit "B."

Part III.

Reasons Relied Upon for the Allowance of Writ.

1. Petitioner contends this writ of certiorari should be granted as a matter of Federal constitutional right by the Supreme Court of the United States upon all grounds urged under parts I, II, and III, and for the reasons shown in the brief accompanying it.

2. The decision of the Court of Appeals of Georgia, of date, April 3, 1942, as herein excepted to is in direct conflict with applicable provisions of the Constitution of the United States and the Constitution of the State of Georgia as set forth in Part II of this petition, in the exceptions *pendente lite* (R. 17) and in the main Bill of Exceptions (R. 1-19, inclusive) appealing the case to the Court of Appeals of Georgia, assigning error upon the overruling of petitioner's demurrer to the indictment and in the certified record of the case attached to the petition as Exhibit "A" and "B" and "C."

3. The decision excepted to is at variance with an unbroken policy as it relates to the paramount duty of the State in the administration of law under our constitutional form of Government.

4. This petition for certiorari sets forth substantial questions of utmost public concern in that they involve questions affecting the laws of criminal procedure in State and Federal Courts invoking construction of and application of provisions of the Constitution of the United States and the Constitution of the State of Georgia in which human rights, privileges and immunities are entangled.

Part IV.

The decision of the Court of Appeals of Georgia sought to be reversed is the decision of said court, of date, April 3, 1942, vacating the judgment of January 16, 1942, and the opinion of said court affirming the judgment of the lower court, as entered upon the motion for rehearing on behalf of the State of Georgia—Justice Gardner dissenting (R. 32 to 47, inclusive reported in 19 S. E., Page 777, 2nd Series.

The petition for certiorari in the Supreme Court of Georgia to reverse and review said decision was denied on May 21, 1942.

Petitioner's motion in the Supreme Court of Georgia for rehearing and reconsideration of its order denying writ of certiorari—was denied on June 16, 1942.

Petitioner submits as his Exhibit "A" a certified copy of the record in the Court of Appeals of Georgia in this case, containing a certificate from the Clerk of the Supreme Court of Georgia showing that his petition for certiorari was denied on May 21, 1942, and the remittitur from the Supreme Court of Georgia was filed in the Clerk's office of the Court of Appeals of Georgia on June 18, 1942.

Petitioner also submits as his Exhibit "B" a copy of his petition for certiorari in the Supreme Court of Georgia, certified to by the Clerk of the Supreme Court of Georgia.

Petitioner also submits as his Exhibit "C" a certificate

from the Supreme Court of Georgia showing that the motion of petitioner for the Supreme Court of Georgia to reconsider its order in denying petitioner's application for certiorari of date May 21, 1942,—was denied on June 16, 1942.

V.

WHEREFORE, petitioner prays that an order granting this petition for certiorari be entered, notifying the Court of Appeals of Georgia of the granting of the petition and that the certified transcript of all proceedings of said Court of Appeals of Georgia in the cause entitled on its docket as 29257—*Clarence J. Thompson* v. *The State of Georgia* transmitted herewith—be treated as though sent up in response to a formal writ, to the end that the said cause may be reviewed and determined by this Court as provided in U. S. C. 344 (B) that said judgment of the Court of Appeals of Georgia in said cause may be reversed by this Court, and that petitioner may have such other and further relief in the premises as this Honorable Court may deem appropriate.

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BRIEF OF AUTHORITIES ON BEHALF OF PETITIONER.

The questions involved and raised by this petition are all interlocked with the query:

Has the state the right to move for a rehearing, or assign error, by way of appeal in a criminal case, upon a judgment quashing an indictment?

To ask the question is to answer in the negative.

This question has been before the Supreme Court of the United States and the Supreme Court of Georgia and courts of other jurisdictions many times, and this Court and the Supreme Court of Georgia, have, in an unbroken line of cases, uniformly held that in criminal cases, the State has no right of appeal.

This Court in an exhaustive opinion rendered in the case of: *The United States* v. *Sanges,* reported in 144 U. S., 310 *et seq.* holds that the Government did not have the right of appeal. In the *Sanges* case, the defendant filed a demurrer to the indictment and the demurrer was sustained by the lower judiciary. The United States excepted and took the case to the Supreme Court of the United States for review and the Court reversed the decision of the lower court and cited many decisions in support of its decision; among the cases cited was a Georgia case, being that of the *State of Georgia* v. *William Jones,* reported in 7th Georgia—Page 422.

In the *Jones* case, the lower court quashed the indictment, which charged the defendant with the offense of false imprisonment.

A writ of error was sued out to review the decision of the lower court.

A motion was made in the Appellate Court to dismiss the writ of error, on the ground that a writ of error does not

lie at the instance of the State to review a decision in favor of the defendant, and the Supreme Court of Georgia sustained the motion and dismissed the writ of error.

The decision of the highest court of Georgia was written in the year 1849 and has been followed continuously ever since and the ruling as made in the *Jones* case has never been questioned until the judgment by a divided bench now under review was rendered.

In the case at bar, the indictment against defendant, Thompson, was demurred to (R. 12) and his demurrer was overruled (R. 17): Thompson excepted *pendente lite* (R. 17) and upon being convicted, excepted on bill of exceptions, assigning error on exceptions *pendente lite* (R. 1, *et seq.*) and carried his case by writ of error to Court of Appeals of Georgia. The Court of Appeals of Georgia, upon reviewing the writ of error on demurrer, reversed the judgment of the lower court, because the lower court erred in not quashing the indictment (R. 22) and the same court, by a divided bench, upon a motion for rehearing, reversed its former decision.

The majority opinion in the decision under review, holding in the first head note, "upon a proper motion by counsel for the State, a rehearing may be granted, and this Court may reverse its former judgment granting a new trial before the adjournment of the term (R. 32) dissenting opinion (R. 41).

It is respectfully submitted that the statement of the court, concerning the grant of a new trial, in the former judgment is an arbitrary conclusion and is not supported by the record.

The first judgment and the only one, that the court could have had in mind—the judgment rendered January 16, 1942, (R. 22) said nothing about the grant of a new trial.

In this former judgment no new trial was granted—this judgment had no strings tied to it—it was unconditional—

it was absolute and final and said in terse words—"The judgment of the lower court is reversed because the court erred in not quasning the indictment" (R. 22).

The premise of the court being based upon an incorrect statement, it follows that the Court of Appeals of Georgia did not of its own motion vacate the first judgment, because the decision under review expressly says that the decision was rendered not on its own accord, but was at the instance of the State, upon a written motion for rehearing filed by the State (R. 22).

But, be this as it may—the first judgment of the Court of Appeals of Georgia in the case at bar was a final judgment—the Appellate Court quashed the indictment and this was equivalent in law of a verdict of not guilty, and this being true, the court of competent jurisdiction having given the defendant a victory, could not during the same term of court, or any other term, reverse its judgment, even though the acquittal be founded upon misdirection of the judge.

Says Judge Nisbit—in the case of the *State of Georgia* v. *Jones*—7th Ga. Reports on Page 424, of the volume cited: "If the effect of the judgment is a discharge, there can be no rehearing, either by a new trial or writ of error."

Further, on Page 425 of the same volume, the jurist says:—

"Errors in law cannot be reached by a new trial at the instance of the State." The *Jones* case is cited and approved by the Supreme Court of the United States in the case of *United States* v. *Sanges*, 144th U. S. 310.

We submit that there can be no technical distinction of difference in the words "rehearing" and in the phrase "writ of error" or "appeal"; they all are words and phrases synonymous, in application, and in common parlance mean the right to be heard over again for the purpose of effecting a change.

But, enough has been said. The decision of the Court

of Appeals of Georgia of date April 3, 1942, sounding in the name of *Clarence J. Thompson* v. *The State of Georgia,* reported Georgia Appeals,—Page ———; 19 S. E. (2nd Series) Page 777—by a divided Bench: and being the decision now under review—is a solitaire—is out of harmony with the organic law—is in direct conflict with the Constitution of the United States and the State of Georgia in that by this decision, petitioner was deprived of his liberty without due process of law and was twice placed in jeopardy for the same offense.

The decision excepted to is out of tune with established principles of law and procedure, in criminal cases, so old, that the memory of man runneth hardly to the contrary.

Respectfully submitted,

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Petitioner in Certiorari.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO. 343

CLARENCE J. THOMPSON,
Petitioner,

v.

THE STATE OF GEORGIA,
Respondent.

BRIEF OF THE STATE OF GEORGIA, RESPONDENT, IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO COURT OF APPEALS OF GEORGIA.

JOHN A. BOYKIN, Solicitor-General,
E. E. ANDREWS, L. DANIEL DUKE,
DURWOOD T. PYE, Assistant Solicitors-General, Attorneys for The State of Georgia, Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

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CLARENCE J. THOMPSON,
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THE STATE OF GEORGIA,
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BRIEF OF THE STATE OF GEORGIA, RESPONDENT, IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI TO COURT OF APPEALS OF GEORGIA.

PART ONE

STATEMENT OF CASE

Clarence J. Thompson was charged in separate counts of an indictment in the Superior Court of Fulton County, Georgia, with three separate offenses of misdemeanor. It was alleged that the City of Atlanta sold water to customers who paid therefor on the basis of the cubic feet supplied as measured and recorded by a meter installed by the City, and that Thompson, an inspector employed by the City in its water works department, pursuant to a corrupt agreement and conspiracy between him and named water custom-

ers, altered the meters installed on said customers' premises so that they failed to register and record a substantial part of the water flowing through them and used by the customers, causing the City to render said customers bills for less water than was supplied and used by the customers, who paid Thompson for accomplishing that result; all of which acts defrauded the City of stated amounts of water of stated values.

Thompson's demurrer challenging each count of the indictment as charging no crime was overruled by the Superior Court, and upon his subsequent conviction on each count and denial of new trial he excepted to all adverse rulings by bill of exceptions to the Court of Appeals of Georgia. The Court of Appeals held the demurrer should have been sustained and the indictment quashed as charging no crime, but subsequently during the term and before remittitur or mandate to the Superior Court, the Court of Appeals, upon motion for rehearing filed by the State (R. 22-27), held that the State might move for rehearing and the court reconsider the case, and refusing to dismiss the motion for rehearing, withdrew its first opinion and the consequent judgment of reversal, reconsidered the case, and held the indictment did charge a crime under the laws of Georgia and that the demurrer was rightly overruled and Thompson's conviction without error. *Thompson v. State*, 19 S. E. (2nd) 777; R. 32-41. The Supreme Court of Georgia denied certiorari and refused rehearing. R. 49, 60.

The instant petition to the Supreme Court of the United States for certiorari to the Court of Appeals of Georgia challenges the constitutionality of the action of the Court of Appeals in withdrawing its opinion and judgment favorable to Thompson and thereafter substituting an opinion and judgment unfavorable to him. It is contended by applicant that the reconsideration of the case by the Court of Appeals resulting in that court's correction of its error in first holding the indictment charged no crime, violated (1)

the provision of the Constitution of Georgia against double jeopardy (2) the due process clause of the Constitution of Georgia (3) the Fifth Amendment to the Constitution of the United States, and (4) the Fourteenth Amendment to the Constitution of the United States. (His petition, Part II, pars. 2, 3, 4, p. 9.)

SUMMARY

In the Court of Appeals petitioner did not urge the State or Federal Constitutions. He had opportunity to do so in his motion to dismiss the State's motion for rehearing (R. 27-30) and did urge a claim that the State could not move for rehearing because not a "party" to a criminal case. In his petition to the Supreme Court of Georgia for certiorari to the Court of Appeals a claim of infringement of the State Constitution was made, but error is not now assigned on the judgment of the Supreme Court. In these circumstances petitioner's assertion of denial of constitutional right comes too late.

The assignments of error based on the Constitution of Georgia do not present any Federal question, the enforcement of the Constitution of Georgia being a matter for the courts of the State.

The assignments of error based on the Fifth Amendment are without merit as that Amendment is directed to the Federal government and not the States.

No violation of the Fourteenth Amendment is shown. In permitting the State to file motion for rehearing and in thereafter reconsidering the case and correcting its erroneous opinion and judgment while the case was within its jurisdiction, the Court of Appeals did not deprive petitioner of due process of law, but simply availed itself of familiar and usual procedure to the end that its judgments might be correct. Petitioner invoked the judgment of the Court of Appeals to decide his case and the procedure of rehearing was incident to that decision. There is no sub-

stance to the claim of petitioner that the action of the Court of Appeals put him in jeopardy twice for the same offense; but if what was done were taken to have that effect no denial of due process would appear. *Palko v. Connecticut*, 302 U. S. 319, 82 L. ed. 288, rules this case as to that contention.

PART TWO

ARGUMENT

NO FEDERAL QUESTION IS PRESENTED BY THE CLAIM THE STATE CONSTITUTION WAS VIOLATED.

The courts of the State have full power and authority to construe the Constitution and laws of the State, and their construction is final, conclusive and binding upon the Supreme Court of the United States. A writ of certiorari will not issue out of the Supreme Court of the United States to a State court to review a decision based on State law, for the Supreme Court of the United States has no jurisdiction to review decisions based on State law. *McBride v. Hoyne*, 11 Peters (36 U. S.) 167, 9 L. ed. 673; *Congdon v. Goodman*, 2 Black (67 U. S.) 574, 11 L. ed. 257; *Palmer v. Marston*, 14 Wall. (81 U. S.) 10, 20 L. ed. 826; *Sevier v. Haskell*, 14 Wall. (81 U. S.) 12, 20 L. ed. 827; *de Saussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125; *Quimby v. Boyd*, 128 U. S. 488, 32 L. ed. 502; *Avery v. Popper*, 172 U. S. 305, 45 L. ed. 203; *Smalley v. Laugenour*, 196 U. S. 93, 49 L. ed. 400; *Allen v. Allegheny Co.*, 196 U. S. 458, 49 L. ed. 551; *Elder v. Badgley*, 204 U. S. 85, 51 L. ed. 381; *Sylvester v. Washington*, 215 U. S. 80, 54 L. ed. 101; *Lem Woon v. Oregon*, 229 U. S. 586, 57 L. ed. 1340; *John v. Paullin*, 231 U. S. 583, 58 L. ed. 381.

The Court of Appeals did not in terms pass upon any constitutional question (headnote 1 of opinion, R. 32, body of opinion, R. 35), petitioner not invoking any provision of the State or Federal Constitutions in that court (see motion to dismiss State's motion for rehearing, R. 27-31), and under such circumstances petitioner may not now assert a

claimed violation of the State Constitution (*New York ex rel. Rosevale Realty Co. v. Kleinert,* 268 U. S. 646 (1), 650, 651, 69 L. ed. 1135, 1137). Petitioner contends, however, that the "decision of the Court of Appeals of the State of Georgia *necessarily involved* a construction . . . of the Constitution of Georgia and was contrary thereto" (his petition, p. 10). We doubt the soundness of this contention (Cf. *Harding v. Illinois,* 196 U. S. 78, 88, 49 L. ed. 394, 397); but taking this contention as correct, it shows no jurisdiction in the Supreme Court of the United States, for this court is without authority to enforce State Constitutions. " . . . the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; . . . This court's power to review decisions of State courts is limited to their decisions on Federal questions; . . . the mere fact that a State court has rendered an erroneous decision on a question of State law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not . . . confer appellate jurisdiction on this court." *Brunkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U. S. 673, 679, 680, 74 L. ed. 1107, 1113.

Each State has the right to construe its own statutes and constitutional provisions. "The unconstitutionality of a statute may depend upon its conflict with the Constitution of the State or with that of the United States. If conflict with the State Constitution is the sole ground of attack, the supreme court of the State is the final authority . . ." *Michigan Central Railroad v. Powers,* 201 U. S. 245, 290, 291, 50 L. ed. 744, 760. "It is sufficient to say in reference to this contention that the decision of the supreme court of the State . . . sustaining the statute is conclusive in this court, as to any question of conflict between it and the State Constitution. *West River Bridge Co. v. Dix,* 47 U. S. (6 How.) 507; *Bucher v. Cheshire R. Co.,* 125 U. S. 555; *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232; *Lewis v. Monson,* 151 U. S. 545; *Adams Express Co. v. Ohio State Auditor,* 165 U. S. 194; *Long Island Water Supply Co. v.*

Brooklyn, 166 U. S. 686." *Merchants & Manufacturers National Bank v. Commonwealth,* 167 U. S. 461, 462, 463, 42 L. ed. 236, 237. "But the conformity with the State Constitution of the proceedings . . . is a question for the determination of the State court, and its judgment is final." *Smith v. Jennings,* 206 U. S. 276, 278, 51 L. ed. 1061, 1063. "It is argued that the Court of Appeals exceeded its functions under the Constitution of the State, and in that way denied the plaintiff due process of law. We see no reason to think so, but with that question we have nothing to do." *Burt v. Smith,* 203 U. S. 129, 135, 51 L. ed. 121, 127. "It is argued that the State court misconstrued the statute, but we have nothing to do with that." *King v. West Virginia,* 216 U. S. 92, 101, 54 L. ed. 396, 401. See, *French v. Taylor,* 199 U. S. 274, 50 L. ed. 189. "The State supreme court held that the trial court, in admitting the testimony, did not commit error. This, notwithstanding the Constitution of Missouri provided 'that no person shall be compelled to testify against himself in a criminal case.' Its ruling upon that proposition is not subject to review in this court." *Barrington v. Missouri,* 205 U. S. 483, 486, 51 L. ed. 890, 894. See, *Leeper v. Texas,* 139 U. S. 462, 35 L. ed. 225, 227. That the action of the trial court in admitting the evidence was not contrary to the Constitution of the State "is for this court foreclosed by the decision of the highest court of the State." *Brown v. New Jersey,* 176 U. S. 172, 174, 44 L. ed. 119, 120.

THE STATE CONSTITUTION WAS NOT VIOLATED.

The Constitution of Georgia provides "No person shall be deprived of life, liberty, or property, except by due process of law" (*Code of Georgia of* 1933, *Sec.* 2-103); and "No person shall be put in jeopardy of life, or liberty, more than once for the same offense, save on his, or her own motion for a new trial after conviction, or in case of mistrial (*Code of Georgia of* 1933, *Sec.* 2-108). The action of the Court of Appeals in granting a rehearing at the instance of the State and thereafter reconsidering the case and hold-

ing the indictment good as charging a crime and petitioner's trial free from error, was in no way contrary to these constitutional provisions.

Due process of law was not denied petitioner by the action of the Court of Appeals. It is familiar practice in appellate courts to consider motions for rehearing and correct any errors pointed out thereby. The desire of the Court of Appeals to render a *correct decision* even though it necessitated a reversal of its first opinion is certainly not a *denial* of due process. Rather, it would seem to be the surest *guarantee* of due process of law. Rehearings during the term and before the remittitur has been transmitted to the court below are provided for by the rules of the court upon motion of the losing party. *Code of Georgia of* 1933, *Sec.* 24-3643.

The provision against double jeopardy was not violated by the action of the Court of Appeals. What the Court of Appeals did in this case, that is, simply review and correct its own opinion and judgment during the term and before its remittitur had been transmitted to the court below, is not even remotely related to the evil of putting the citizen "in jeopardy of life or liberty more than once for the same offense save on his, or her own motion for new trial after conviction," as forbidden by the Constitution of Georgia. The evil which the Constitution forbids is that of putting the citizen on trial before a jury which acquits him and thereafter putting him on trial for the same offense before another jury which may convict him notwithstanding the prior acquittal. It does not in any way deal with the practice which an appellate court may adopt in order to determine a writ of error brought to that court by an accused who complains of errors of law resulting in his conviction in some court of original jurisdiction.

Petitioner was not in "jeopardy" in the Court of Appeals. His case was in that court on writ of error brought by him invoking the jurisdiction of that court to determine ques-

tions of law. "Jeopardy," in the constitutional sense, refers to an accused being put on trial before a jury which is authorized to convict him of crime. See, *Reynolds v. State*, 3 Ga. 53. "That jeopardy begins when the jury are empanelled and sworn is the rule recognized in Georgia. *Newsom v. State*, 2 Ga. 60; *Nolan v. State*, 55 Ga. 521." *Franklin v. State*, 85 Ga. 571. There was no jury in the Court of Appeals, nor was that court empowered to convict or acquit him of any offense. Petitioner was in "jeopardy" in the Superior Court when he there went on trial before the jury which convicted him, and that is the only time he has been in "jeopardy" in this case.

Petitioner's claim is that the first opinion and judgment of the Court of Appeals served to sustain his demurrer to the indictment and dismiss the indictment as charging no crime; and that he was thereby discharged and acquitted, and relieved of the punishment imposed upon him in the trial court; and when the Court of Appeals withdrew that opinion and judgment and substituted therefor an opinion and judgment that the indictment did charge a crime, the court thereby placed him in a situation in which he must suffer the punishment imposed upon him in the trial court, contrary to the result of the former opinion and judgment; and that this in effect was double jeopardy, because having obtained a favorable opinion amounting to an acquittal he was entitled to have that acquittal stand.

Assuming this contention to correctly state the facts, it presents no case of double jeopardy within the meaning of the Constitution. For the Constitution does not relate to procedure in appellate courts and is irrelevant. The action of the Court of Appeals in the premises was but incident to and a part of the regular determination of the judgment of that court which petitioner invoked by his bill of exceptions.

But petitioner's claim rests upon an incorrect premise respecting the effect of the first opinion and judgment of

the Court of Appeals. That opinion and judgment did not acquit petitioner. The judgment was not a final judgment in his favor. It created no settled rights in him. In Georgia the Court of Appeals and Supreme Court do not operate directly upon litigants. Those courts merely affirm or reverse the judgments of trial courts, and before the rights of litigants are affected it is necessary that the trial court render judgment in the case upon the remittitur of the appellate court. In some cases the situation in the trial court has changed from that presented to the appellate court, as by the filing of an amendment, and the remittitur is not carried into effect, but the case reconsidered by the trial court in the light of the new pleadings. *Berrien County Bank v. Alexander,* 154 *Ga.* 775 (1), 777, 778, 779; *Savannah v. Chaney,* 102 Ga. 814 (1); *Jackson v. Security Insurance Co.,* 47 Ga. App. 626 (1). Judgments of the Court of Appeals and Supreme Court do "not terminate a case proprio vigore, but (such) judgments have to be carried into effect by the Circuit Court." *Sullivan v. Rome,* 28 Ga. 29, 30. Before petitioner could acquire any final rights from the opinion and judgment of the Court of Appeals it would have been necessary for the remittitur from that court to have been received in the Superior Court of Fulton County and made its judgment.

It is also the law in Georgia that "judgments of (the Court of Appeals and Supreme Court) are completely under (their) control during the term at which they are rendered, (and) until the remittitur has been transmitted to the court below." *Cooper v. Portner Brewing Company,* 113 *Ga.* 1. See, also, *Seaboard Air-Line Rwy. Co. v. Jones,* 119 Ga. 907. When petitioner by his bill of exceptions to the Court of Appeals invoked its judgment, he invoked it subject to this law. And when that court rendered its first judgment in his favor, it rendered it subject to this law, and subject to the right, power, authority and duty of the court to change that judgment during the term and before the

remittitur had been transmitted, if it by any means became convinced that such judgment was erroneous.

True, as petitioner says in his brief, in Georgia the State has no right of appeal in criminal cases, even in a case in which the indictment has been dismissed on demurrer as charging no crime and the accused never put in jeopardy before a jury. *State of Georgia v. Jones,* 7 Ga. 422. The right of appeal in such cases, however, is not denied upon constitutional grounds, but because of common law principles forbidding it unchanged by subsequent statute. See, *Georgia v. Jones* (supra) pp. 424, 425. That the State may not appeal in criminal cases affords no reason why the State may not move for rehearing in a criminal case in the Court of Appeals or Supreme Court in keeping with the rules of court applicable to motions for rehearing, and the court grant rehearing and render an opinion and judgment contrary to that first rendered; for such procedure relative to rehearing is in no sense an appeal by the State, but is merely a part of the process used by the appellate court whereby it avails itself of the service and suggestion of its bar to the end that its judgments may be in accordance with law. In reconsidering the case upon motion of counsel for the State the appellate court is not entertaining *any appeal by the State,* but is disposing of the *appeal by defendant* who brought the case to the appellate court and invoked its jurisdiction and the decision incident to which the rehearing is granted.

Petitioner says the action of the Court of Appeals in his case "is a solitaire"; and it is true the case seems to be the first in Georgia in which the Court of Appeals or Supreme Court granted rehearing of a criminal case at the instance of the State and thereafter rendered a contrary judgment. This is no evidence of illegality or unconstitutionality, nor is the procedure without physical precedent in Georgia. Motions for rehearings were filed by the State without challenge in the Court of Appeals in *B'Gos v. State,* 43 Ga. App.

379, and *Hurt v. State,* 62 Ga. App. 878; and in the Supreme Court in *Layton v. State,* 165 *Ga.* 265, 281. In Texas, the Constitution, in terms, denies the State the right of appeal in criminal cases (*State v. Daugherty,* 5 Texas 1; *McCue v. State,* 75 Tex. Cr. R. 137, 170 S. W. 280 (20); and motions by the State for rehearing in the appellate courts are frequently considered and determined (*Cole v. State,* 92 Tex. Cr. R. 360, 243 S. W. 1100 (10); *Fitts v. State,* 98 Tex. Cr. R. 146, 264 S. W. 1006 (45); *Cooper v. State,* 98 Tex. Cr. R. 446, 265 S. W. 894 (4)). Petitioner's disappointment is understandable, but he shows no illegality in the action of the Court of Appeals in correcting its error.

NO FEDERAL QUESTION WAS RAISED IN THE COURT OF APPEALS.

The right of the State to move for rehearing was challenged by petitioner in the Court of Appeals by his motion to dismiss the motion for rehearing. The motion to dismiss was upon the ground the State could not move for rehearing in a criminal case because it was not a "party" thereto, being only the accuser, petitioner contending the court could entertain motions for rehearing only when made by a "party" to the case. No claim was made that the Federal Constitution forbade the court to reconsider the case at the State's instance. R. 27-30. In Paragraph 23 of the petition to the Supreme Court of Georgia for writ of certiorari to the Court of Appeals it was contended the action of the Court of Appeals in the premises of the rehearing was contrary to the provision of the State Constitution against double jeopardy, but the Federal Constitution was not mentioned, nor is error assigned on the judgment of the Supreme Court. Petitioner having had opportunity to assert his claims under the Federal Constitution in his motion to dismiss the State's motion for rehearing and not having then done so, this court will not entertain the claim at this late date, under the settled rule that "where the record does not show that (petitioner's) objection was placed on

any Federal ground in the lower courts" the Supreme Court of the United States is without jurisdiction. *House v. Road Improvement District,* 266 U. S. 175 (3), 69 L. ed. 229, 230.

Petitioner seeks to avoid the consequences of this law by contending "that the violation of the provisions of the Federal Constitution could not have been invoked until the Court of Appeals of Georgia rendered this judgment of April 3, 1942 . . . and vacated a solemn judgment of acquittal, in favor of petitioner and (withdrew) . . . a previous opinion in the same case and (rendered) . . . another opinion in contradiction of the first . . ." (His petition, par. 9, p. 12.) This contention is untenable. Petitioner invoked and the Court of Appeals determined his claim that the State could not move for rehearing because it was not a "party" to the case. Why could he not at the same time have invoked his alleged rights under the Federal Constitution? It is clear he could have done so, and equally clear that his belated assertion in this court of claims under the Fifth and Fourteenth Amendments is an afterthought insufficient to confer jurisdiction.

Petitioner also makes the same contention respecting the Federal Constitution as he makes respecting the State Constitution, that is, that the action of the Court of Appeals in reconsidering and redeciding the case *"necessarily involved a construction"* of the Federal Constitution (his petition, par. 5, p. 10). It is difficult to see how this could be correct. The court in its opinion did not mention the Constitution. The record did not refer to the Constitution. Counsel did not suggest that any constitutional question was involved. That the case "necessarily involved" the Constitution was kept secret from all concerned until the filing of the instant petition for writ of certiorari.

THE FEDERAL CONSTITUTION WAS NOT VIOLATED.

(a) The Fifth Amendment.

Petitioner's claim that the Fifth Amendment was violated is without merit because that Amendment "is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to . . . the States." *Barron v. Baltimore,* 7 Peters 243, 8 L. ed. 672. To the same effect, see, *Twining v. New Jersey,* 211 U. S. 78, 93, 53 L. ed. 97, 103; *Spies v. Illinois,* 123 U. S. 131, 31 L. ed. 80; *Brown v. New Jersey,* 175 U. S. 172, 44 L. ed. 119; *Barrington v. Missouri,* 205 U. S. 483, 51 L. ed. 890. "The Fifth Amendment . . . is not directed to the States, but solely to the Federal government." *Palko v. Connecticut,* 302 U. S. 319, 322, 82 L. ed. 288, 290.

(b) The Fourteenth Amendment.

The contention that the Fourteenth Amendment was violated because the Court of Appeals did not follow the State Constitution proceeds upon the ". . . misconception . . . that the requirement of due process of law took up the special provisions of the State Constitution and laws into the Fourteenth Amendment for the purposes of the case, so that this court would review the decision of the State court to see that the local provision had been complied with. This is a mistake." *Rawlings v. Georgia,* 201 U. S. 638, 639, 50 L. ed. 899, 900.

Was it a denial of that due process of law guaranteed by the Fourteenth Amendment for the Court of Appeals to entertain the State's motion for rehearing and thereafter decide the case against petitioner upon reaching the conclusion that its first opinion in his favor was erroneous? This question is readily answered in the negative. Petitioner's case was in the Court of Appeals on writ of error brought by him, whereby he invoked the jurisdiction of that court for the determination of the questions he presented. In determining those questions the Court was at

liberty to adopt such procedure as in its opinion made for correct decision, and if before it lost jurisdiction (that is, during the term and before the remittitur was transmitted to the lower court) it concluded that a judgment theretofore pronounced by it in the case was error, it was within the power of the court to modify or change that judgment; and such action was not a denial, but was a guarantee of due process.

The State ". . . is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offend some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U. S. 97, 105. "The concept of due process is not technical. Form is disregarded if substantial rights are preserved. In whatsoever proceeding, whether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness, the failure to observe which would offend men's sense of the decencies and proprieties of civilized life." Per Roberts, J., in *Snyder v. Massachusetts* (supra), at p. 127. Petitioner's contention of denial of due process, in the light of these principles, seems strained.

It is averred by petitioner that he was denied due process because the action of the Court of Appeals amounted to an allowance of an appeal by the State in a criminal case. Sufficient refutation of this is found in the fact that the Federal government is prohibited by the Fifth Amendment from denying due process of law, yet the United States has right of appeal on questions of law in some criminal cases under the circumstances stated in the statute, U. S. C. A., Title 18, Sec. 682, which has been held constitutional in *Taylor v. United States*, 207 U. S. 120, 127, 52 L. ed. 130, 134. In that case the court said of the attack on the act of Congress: "The defendant argues that the United States cannot be allowed a writ of error in a criminal case like this.

We do not perceive the difficulty . . . We think it unnecessary to discuss the question at length." See, also, *United States v. Bitty,* 208 U. S. 393, 399, 52 L. ed. 543, 545.

Petitioner contends the Court of Appeals put him in jeopardy twice for the same offense. We have already shown that this contention rests upon a false premise as to the effect of the first opinion and judgment of that court; but if it were true, no failure to observe due process would appear. For due process of law as required by the Fourteenth Amendment does not prevent the State from twice putting an accused in jeopardy for the same offense if under the laws of the State it be determined that errors to the prejudice of the State entered into his former trial and acquittal. It is not offensive to the conscience of mankind, nor contrary to any "principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental," to require that an accused only be discharged after fair and impartial trial in accordance with the law, and not contrary thereto. If the first opinion and judgment of the Court of Appeals amounted to an acquittal of petitioner, as he contends, it is nevertheless true that such acquittal arose out of an error of law in that court holding the indictment charged no crime, and due process was not denied petitioner by the correction of the error while the court had jurisdiction of the case; for claim to fundamental right cannot rest upon the shifting sands of error.

In *Palko v. Connecticut,* 302 U. S. 319, (1, 3), 328, 82 L. ed. 288, (1, 3), 293, 294, this Court held: "A State statute permitting appeals in criminal cases to be taken by the State is not an infringement of the due process provisions of the Fourteenth Amendment . . . A conviction in a State court of murder in the first degree on a second trial of a criminal prosecution after a conviction of murder in the second degree had been set aside on an appeal taken by the State is not in derogation of any privileges or immunities

that belong to the accused as a citizen of the United States, in violation of the Fourteenth Amendment." "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?' *Herbert v. Louisiana,* 272 U. S. 312, 71 L. ed. 270. The answer surely must be 'no' . . . The State is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error. *State v. Felch,* 92 Vt. 477, 105 A. 23; *State v. Lee,* 65 Conn. 265, 30 A. 1110, 27 L. R. A. 498, 48 Am. St. Rep. 202. This is not cruelty at all, nor even vexation in any immoderate degree. If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint. A reciprocal privilege . . . has now been granted to the State. There is here no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than before." Giving to the action of the Court of Appeals the construction placed upon it by petitioner, and taking all he says as true, the above case rules this, and adverse to his contentions.

There is some suggestion that the privileges and immunities belonging to petitioner as a citizen of the United States were denied him contrary to the privileges and immunities clause of the Fourteenth Amendment. The same contention was made and rejected in *Palko v. Connecticut* (supra). Said the Court there (p. 329): "There is argument in his behalf that the privileges and immunities clause of the Fourteenth Amendment as well as the due process clause has been flouted by the judgment. *Maxwell v. Dow,* 176 U. S. p. 584, 44 L. ed. 598, gives all the answer that is necessary."

THE INDICTMENT CHARGED A CRIME UNDER THE LAWS OF GEORGIA.

That it may clearly appear no injustice has been done petitioner we will now show that the indictment charged a crime under the laws of Georgia, and that the Court of Appeals did right in correcting its error in first ruling to the contrary. All Code references refer to the Codes of Georgia, and, unless indicated to the contrary, to the Code of 1933.

A Crime Is Charged Under Applicable Common Law Principles.

At the common law the offenses of fraud, cheating, and false pretenses, within the limits set up and defined by the common law, were crimes punishable as misdemeanors. These limits were at first rather restricted, but by the early statute of 33 *Henry VIII c* 1, and the subsequent statutes of 30 *George II c* 24 and 52 *George III c* 64 *sec.* 1, these limits were broadened and the earlier restrictions removed, for the surer prevention of frauds and the more certain punishment of cheats and swindlers. See, 25 *C. J. p.* 584, *Sec.* 1.

In Georgia by the Act of February 25th, 1784 (*Marbury & Crawford's Digest,* 1802, *p.* 404) all laws "in force and binding on the inhabitants of the province on the 14th day of May 1776" not contrary "to the Constitution, laws and form of government now established," were declared "binding on the inhabitants of this State . . . And also the common law of England and such of the statute laws as were usually in force in the said province," and all fines, penalties and forfeitures inflicted or made payable to the crown were "directed to be paid into the public treasury of this State."

The Tenth Division of the Penal Code of 1817 (*Prince's Digest,* 1822, *pp.* 367-369) was entitled "Offences committed by cheats and swindlers, and offences against public trade." This Division contains eleven sections. Various specific acts of fraud described in detail are made crimes, and in addition thereto the following general provisions against fraud

and deceit are laid down: "Sec. II. Any person using any deceitful means (other than those which have been mentioned in this Code) or practices in matters of fraud, shall be deemed a cheat and swindler . . . Sec. VI. Any other deceitful or artful practice, by which individuals or the public are defrauded and cheated, shall be punished . . . Sec. XI. All other offences committed by cheating and deceit, or offences against the public trade, not herein enumerated, but which may occur, or have heretofore been indictable, shall be punished . . ."

In the present Code of 1933, in addition to the specific acts of fraud enumerated in *Part XII, Sec.* 26-7410 provides: "Any person using any deceitful means or artful practice, other than those which are mentioned in Part XII of this Title, by which an individual, or a firm, or a corporation, or the public is defrauded and cheated, shall be punished as for a misdemeanor." This section has appeared in substantially the same language in all the Codes of this State, as follows: Cobb's Digest, p. 822; Code of 1861, Sec. 4463; Code of 1867, Sec. 4507; Code of 1873, Sec. 4596; Code of 1882, Sec. 4895; Code of 1895, Sec. 670; Code of 1910, Sec. 719.

Of this section it has been said: "But *any act,* by which another is 'defrauded and cheated,' under that section, makes the offender a cheat and swindler." *Hampton v. Brown,* 32 Ga. 251, 252.

It has been also said: "In Scots and civil law, the word 'stellionate' is used to denote all such crimes in which fraud is an ingredient as have no special names to distinguish them, and are not defined by any written law. This section may, therefore, be said to be the statute against stellionates." *Foster v. State,* 8 Ga. App. 119, 121.

This section was intended to embrace the three omnibus sections above quoted from the Penal Code of 1817, and in

view of its broad provisions and also in view of the language of Sec. XI of the Code of 1817 retaining as crimes "all other offences committed by cheating and deceit . . . which . . . have heretofore been indictable"; it is clear, first, that all acts of fraud amounting to crimes under the common law and applicable English statutes are retained as crimes, and, second, that the classes of acts recognized by the common law and English statutes to be crimes have been greatly enlarged by this section. "It very greatly enlarges the common law and statutory offences of cheating and swindling by false pretenses or representations . . . Many acts would be criminal under this statute, which would not be criminal under the common law, or under statutes specifically defining the offense of cheating and swindling." *Crawford v. State*, 2 Ga. App. 185, 187. Certain it is, beyond cavil, that any act of fraud which was an offence under the common law is a crime under this section.

As already stated, by the Act of 1784 the common law and applicable English statutes were adopted in this State. This served to make acts which were crimes under the common law, crimes in this State under the statute. It did not retain the common law power of the judges to declare criminal by judicial decision acts they thought wrong, and in that sense it did not retain "common law crimes" in Georgia (*Jenkins* v. *State*, 14 Ga. App. 276, 278); but it did retain as crimes all acts then criminal under the law of England as theretofore laid down and declared by legislative or judicial authority. The adoption of a Penal Code did not abrogate this law. *State v. Jno. Maloney, R. M. Charlton*, 84. Pursuant to this principle, the Code, *Sec. 26-5001*, provides: "Any other offense against public justice, not in this Title provided for, shall be a misdemeanor." This section thus expressly adopts "and makes crimes in this State offenses against public justice . . . which were punishable as such at common law." *Ormond v. Ball*, 120 Ga. 916, 923, 924; *Prichard v. State*, 160 Ga. 527. *Section 26-6501* pro-

vides likewise with respect to offenses against the public peace.

Thus, both under the blanket statute against cheats and under Sec. 26-5001, any fraudulent act which was a crime at the common law is a crime in this State.

We will now proceed to show that the indictment charges a crime at common law.

Common law frauds were divided into two classes, "private cheats" and "public cheats." The offense of "private cheat" was narrow and many frauds were excluded from its operation, it being necessary that a false symbol or token be used in the fraud. The offense of "*public cheat,*" however, was broad and comprehensive. "In public cheats the use of *any fraudulent* device was sufficient to constitute the crime . . . , and it was not necessary that a false symbol or token was made use of. Comprehended within the class of frauds of a *public nature* are frauds affecting the course of justice, cheats by officials, and those immediately injuring the interests of the government or the public, although arising in the course of some particular transaction or contract with private individuals." 25 *C. J. pp.* 586, 587, *Sec.* 3. Among public cheats were "those immediately injuring the interests of the crown . . . the selling of unwholesome provisions and cheats by officials." 12 *Am. & Eng. Enc. p.* 795.

"Cheats which are leveled against public justice, as judicial acts done without authority in the name of another, and frauds which affect the government and the public at large, as rendering false accounts by persons in official positions, writing false news, selling unwholesome provisions, and using false weights and measures, were indictable at common law." *Peo. v. Garnett,* 35 Cal. 470, 95 Am. Dec. 125.

It seems to have always been recognized that any fraud which affected the public was an indictable offense. See, *State v. Middleton,* 23 S. C. L. (Dudley) 276, 279.

The following are some cheats punished as public cheats at the common law, because committed by officials: An overseer of the poor attempted to pocket money collected from the putative father of a bastard, resulting in the "parish being deprived of a fund legally applicable to them (whereby the parish) were defrauded and damnified." *Reg. v. Martin*, 2 Campl. 268, 170 Reprint 1151. An overseer of the poor who refused to account and used fraudulent practices to deceive the poor. *Reg. v. Commings*, 8 Mod. 179, 87 Reprint 594. A justice's clerk failed to pay over a moiety of a fine due the county. *Reg. v. Dale*, 1 Dears. C. C. 37, 169 Reprint 627. Defendants, a captain and purser on a ship, conspired to fabricate false vouchers to cheat the crown, and did so, and were punished as public cheats. In that case said Groce, J.: "That the delivery of such false vouchers, with such fraudulent intent, in pursuance of a conspiracy for that purpose, is an offense in the place where the vouchers were delivered, is a matter which cannot be doubted." *Reg. v. Brisac, et al.*, 8 E. R. C. 138, 4 East 164, 102 Reprint 792.

A superintendent of constabulary was held indictable for rendering false accounts of monies received by him from the constables contrary to his duty to make reports whereby the sums due him and the others might be ascertained. *Reg. v. Baxter*, 5 Cox C. C. 302.

Any fraud which affected the *public revenue* was an indictable cheat at the common law. This principle was recognized in the following cases: The offense charged was a threat to put in motion a prosecution for selling Fryar's Balsam without a tax stamp, defendant obtaining money by the threat. The court quashed the indictment but recognized that had it been so drawn as to charge an attempt to "compound and stifle a public prosecution . . . in *fraud of the revenue*" it would have charged a punishable fraud. *Reg. v. Southerton*, 6 East, 126, 102 Reprint 1235. An apprentice enlisted as a freeman, defrauding the public treasurer of a

bonus, by falsely representing himself as a freeman. This was a fraud on the revenue and hence a crime. *Reg. v. Jones,* 1 Leach C. C. 174, 168 Reprint 189. Bread containing alum was sold to a royal asylum and was held a fraud on the revenue. *Reg. v. Dixon,* 3 M. & S. 11, 105 Reprint 516. "Where two persons were indicted for enabling persons to pass their accounts with the pay office in such a way as to enable them to defraud the government, and it was objected that it was only a private matter of account, and not indictable, the court held otherwise, as it related to the public revenue." *Reg. v. Bambridge,* 12 Am. & Eng. Enc. p. 795, n. 5. A fraud upon a parish by procuring the marriage of a pauper, so as to charge the parish of public money, was an indictable cheat. *Tarrant's Case,* 4 Burrows, 2106.

Closely akin to frauds on the revenue were frauds affecting the government, or any subdivision thereof, the public, or any large number of persons. These frauds were always held to be crimes. "All frauds affecting the crown, and the public at large, are indictable, though arising out of a particular transaction, or contract with the party." *East P. C. p.* 861. Under this principle, the selling of bad bread for prisoners in a hospital was a punishable cheat. *Treeve's Case, East P. C. p.* 821. The selling of unwholesome provisions was thus a public cheat (25 *C. J. p.* 587, *n.* 40); as was vending unwholesome wine (12 *Am. & Eng. Enc. p.* 795, *n.* 4); delivering bread short in weight to the guardians of the poor (2 *Chit. Cr. Law,* 559, 560); dissemination of false news (12 *Am. & Eng. Enc. p.* 795 *at note* 3); and appropriation of gravel and labor, etc. by a surveyor of highways (*Robinson's Case,* 3 *Chit. Cr. Law,* 666). Many frauds affecting the parish were punished as public cheats because committed against the public and governmental authority. *United States v. Watkins,* 28 *Fed. Cases at p.* 427.

A fraud against a municipality is a fraud against the government and against the public. In the following case the charge was "devising and intending to cheat and de-

fraud the city of New York out of its money and property . . . by procuring certain and divers false and fraudulent claims and bills against said city . . . and claims against said city containing false and fraudulent charges" to be allowed and paid. The court said: " . . . the means as set forth are such 'as if executed would amount to a cheat' within the purview . . . of the Code (as) . . . used in its common law significance. 15 *N. Y. S.* 778, 780. Cheat at common law is such a 'fraud as would affect the public . . . or where there was a conspiracy to cheat.' *Peo. v. Babcock,* 7 Johns 201, 5 Am. Dec. 256. . . . Conspiracies to cheat a state or county or city are held indictable as a combination to injure the public. *Cyc., 'Conspiracy,'* 633, citing: *State v. Cordoza,* 11 S. C. 195; *State v. Young,* 37 N. J. L. 184; *McDonald v. Peo.,* 126 Ill. 150, 18 N. E. 817, 9 Am. St. R. 547; *State v. Olson,* 15 N. Y. S. 778." *Peo. v. Miles,* 108 N. Y. S. 510, 518, 519.

The United States Circuit Court for the District of Columbia in 1829 had under consideration the question of common law public cheats, in an indictment against Watkins, fourth auditor of the treasury, and rendered a considered opinion in the matter, in which the English authorities are collected and discussed. Said the court in the third and fourth headnotes: "3. Frauds affecting the public at large, or the public revenue, constitute a distinct class of cases, punishable by indictment; although the fraud be not affected by means of false public tokens, or by forgery, or conspiracy, or by any particular sort of means. 4. The principle which, in transactions between individuals, requires, in order to make the fraud indictable as a public offence, that it should be committed by tokens, or false pretenses, or forgery, or conspiracy, does not apply to direct frauds upon the public. All frauds affecting the public at large, or an indefinite number of persons who have suffered a common or joint damage, by reason of the fraud, are indictable offences at common law." *United States v. Watkins,* 28 Fed. Cases 419, 420, No. 16,649, 3 Cranch C. C. 441.

Any fraud committed by the *device of a conspiracy* was an indictable cheat at the common law. 25 *C. J. p.* 585, *n.* 22b. See 12 *Am. & Eng. Enc. p.* 796, *n.* 3. Holt, C. J. said: "The crime is not the selling one thing for another, but here is a false token, the one pretending to be a broker, and the other a merchant, or *a combination to cheat.*" *Reg. v. MacKarty, et al.,* 6 Mod. 301, 87 Reprint 1040. See the same case at 3 *Ld. Raym.* 325, 92 Reprint, 713, 2 *Ld. Raym.* 1179, 92 Reprint 280. Particularly was any combination to cheat the public a crime. In the following case conviction was sustained of contractors who combined and conspired to defraud the city of Buffalo out of a sum of money by submitting identical bids for work and then dividing the profits realized out of the scheme. The court discusses common law frauds and cheats and says: "These authorities seem to establish that at common law a distinction was made between deceitful acts, which, when committed against the individual amount only to a private fraud and are not indictable, become indictable when embraced in a combination, where the object of the combination is to defraud and cheat the public." *Peo. v. Olson, et al.,* 15 N. Y. S. 778, 780.

From the foregoing authorities it is clear that the acts set out in the indictment charge a punishable fraud and cheat at the common law and therefore under the laws of this State, as (1) a fraud by an official, Thompson being an inspector of the City of Atlanta in the water works department (2) a fraud on the public revenue, by which the public funds of the City were swindled of a portion of the pay the City should have received for its water (3) a fraud affecting the government, the City of Atlanta being a municipal corporation to which a portion of the powers of government have been delegated (4) a fraud affecting the public, because all the inhabitants of the City are affected by such public frauds in loss of funds rightfully owed the City; and (5) a combination and conspiracy to injure and defraud the public and the City, an agency of government.

A Crime Is Charged Under Code, Sec. 26-7410, the Omnibus Statute Against Cheats and Swindlers.

Not only does the indictment charge a crime at common law, but it charges a violation of *Code, Sec.* 26-7410, considered entirely apart from common law principles applicable to public cheats. As has been stated, the section is comprehensive, embraces the three omnibus sections of the Penal Code of 1817, and is the Georgia "statute against stellionates." It is leveled against "*any* deceitful means or artful practice" whereby another is "defrauded and cheated." *It requires but the concurrence of two things to constitute a crime,* first, on the part of the accused, the use of some "deceitful means" or some "artful practice," and second, on the part of another, the result that that other is defrauded by the deceit or artful practices used. *Any addition to these elements to constitute a crime under this section is not only unauthorized by the plain language of the section but is manifestly repugnant thereto.* The section penalizes not only the frauds which had been practiced prior to its enactment, but comprehends likewise every fraud which the ingenuity of the rascal might devise in future, provided only it be accomplished by some "deceitful means or artful practice" resulting in some person or the public being "defrauded or cheated."

It cannot be denied that when Thompson, an inspector of the City employed in the City water department, conspired with a user of city water to tamper with the city meter registering the water so that it would only register a part of the water received by the user, and did so tamper with the meter, that Thompson resorted to the use of deceitful means and an artful practice. When the City was defrauded of water which flowed through the meter and was used by the customer, when had the City known he had used it the City would have included it on his bill, the crime was complete. The tampering with the meter was both a deceitful means and an artful practice. The very act of the

City inspector *conspiring* with the customer of the City to swindle the City of a portion of the water received by the customer was in and of itself a deceitful means and an artful practice. By the scheme used the meter failed to register all the water which flowed through it. Thus causing the meter upon which the City relied to fail to correctly register the water was a deceitful means and an artful practice. As a result of the scheme the City rendered false bills to the conspiring consumers. Causing the City to render the false bills was a deceitful means and an artful practice. The entire scheme and the means used to effectuate it constituted deceitful means and artful practices.

It is not necessary for a defendant to make use of any *particular kind* of deceitful means or artful practice to be guilty. He may make use of "... tokens, signs, or symbols ... (or) by way of concealment of part of the truth as to a fact, or total and misleading silence." *Ricks v. State,* 8 Ga. App. 449 (1).

The case of *Jones v. State,* 97 Ga. 430, is illustrative of the broad scope of the section of the Code under consideration. There the court ruled: "Where the purchaser of goods worth 25 cents delivered to the seller, for the purpose of making payment and receiving correct change, a gold coin worth $20.00, the former ignorantly supposing that the coin was a silver dollar, and the latter, perceiving the mistake, retained the coin and returned only 75 cents in change, he was guilty of being a common cheat and swindler under the provisions of section (26-7410) of the Code." Further said the court: "The artful practice and the deceitful means which he employed consisted in adopting the necessary precautions to keep her in this belief, and thus enable him to obtain the valuable coin and satisfy her with the inadequate sum given back in change. This persuasive silence and equivocal assent to the girl's misstatement that the coin was only a dollar, while a less tangible form of deceitful practice than a more active artifice would have been, were

none the less effectual in the accomplishment of his fraudulent design—perhaps they were the most effectual means he could have employed, because allaying suspicion on the part of the girl was essential to the success of his dishonest purpose. The ingenious cheat and swindler cannot escape punishment because he invents and employs less clumsy means of deceit, and more cunningly pursues his artful practices, than is usually the case with less adept and skillful members of his craft."

We have thus shown that the indictment charged a crime under the common law of public cheats and under Sec. 26-7410 irrespective of common law principles. We will now show a third violation of law is charged.

A Crime Is Charged Under Code, Sec. 112-9901, Against Buying By False Measures.

Code, Sec. 112-9901, provides: "If any person shall knowingly buy or sell by false weights or measures, he shall be deemed a common cheat, and shall be punished as for a misdemeanor."

The indictment charges that the conspiring consumers *bought* from the City by *false measures,* that is, a *water meter so tampered with* that it would not correctly register the water flowing through it. The offense is a misdemeanor. "All who procure, counsel, command, aid or abet the commission of a misdemeanor are regarded by the law as principal offenders, and may be indicted as such. The indictment may be joint against all those connected with the criminal enterprise, or it may be several against any one of them." *Loeb v. State,* 6 Ga. App. 23 (1). The customers being guilty of *buying* water from the City by false measures, Thompson, who aided and abetted them to that end, is likewise guilty.

It is true that in the indictment the words "buying by false measures" are not used. But this is immaterial. The

indictment sets forth the facts in the case in narrative form and all the essentials of the crime of buying by false measures appear from the allegations of fact made. "The offense is characterized in the indictment not by the name given it, but by the *criminal acts* therein alleged to have been committed." *Lummus v. State,* 17 Ga. App. 414 (1); citing: *Camp v. State,* 3 Ga. 417; *O'Halloran v. State,* 31 Ga. 206; *Aiken v. State,* 90 Ga. 452 (1), 454; *Disharoon v. State,* 95 Ga. 351 (1), 356.

"We conclude, therefore, that, as charging the offense of seduction (the crime denominated), the indictment was bad. Its allegations were inadequate to that charge; but it *contains all the substantive facts* constituting a case of adultery and fornication, alleged probably with too minute and unnecessary particularity, but never-the-less so stated that, if proven, a verdict for the latter offense would stand . . . It has often been ruled in this court that an offense is characterized, not by its specific designation in the indictment, but by the criminal acts therein alleged to have been committed." *Disharoon v. State,* 95 Ga. 351, 356.

The Crime Not Larceny.

Considerable argument was made in the Court of Appeals by petitioner that the crime charged was larceny and not that of defrauding the City of Atlanta, the name given in the indictment. The name given the offense is immaterial. Petitioner would be entitled to have his general demurrer sustained upon the ground no crime was charged only if the allegations of fact sustained that contention. We will show, however, that the crime charged was not larceny and that petitioner was correctly indicted and convicted.

If title to the water not registered on the meter passed to the customers it is elementary the crime was not larceny. See, 2 *Bishop's Criminal Law,* 469, *Secs.* 808 (2), 809.

In no event can the offense be larceny, because title to the water passed to the customers when the water went through

the meter, and all the water involved went through the meter. When the water went through the meter it ceased to belong to the City. The meter was installed for that purpose, to measure the amount of water sold. Simply because it did not correctly measure did not mean that a sale did not take place. The validity of the sale did not depend upon the correctness of the measure. Suppose one should walk into a store and take a leg of mutton from the box where it was kept and the merchant should put it on the scales and weigh it and the buyer took it along with him. Would title to the mutton not be in the buyer, but remain in the merchant, because the night before the buyer had gone in the store and tampered with the merchant's scales so as to cheat him, which he had done by reason of changing the scales and later buying the mutton? Of course not. Title to the mutton passed into the buyer, and the correctness of the scales did not constitute the test. The merchant intended to sell the mutton *put on* the scales. The City intended to sell the water *flowing through* the meter.

In a proper *civil action* the storekeeper could reassert title to his mutton, because that title was obtained by fraud. And likewise, the City (except for the *impossibility* thereof) could later reassert title to its water, because that title was obtained by fraud. But that is not the test in a criminal case. For title actually passed. And until it is reasserted, title remains in the purchaser of the mutton and the purchaser of the water. "A vendee who has obtained title to property under a sale induced by fraud *is the owner of the property* until the seller elects to rescind the sale, and a bona fide purchaser, without notice of the fraud, from such a vendee, will acquire a good title." *Mashburn v. Dannenberg,* 117 Ga. 567 (4).

A defendant, who has obtained title by fraud, cannot, when prosecuted for that fraud, set up the very fraud itself as a defense.

The petition for certiorari to the Court of Appeals of Georgia should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 343

CLARENCE J. THOMPSON,

Petitioner,

vs.

THE STATE OF GEORGIA.

PETITION FOR REHEARING.

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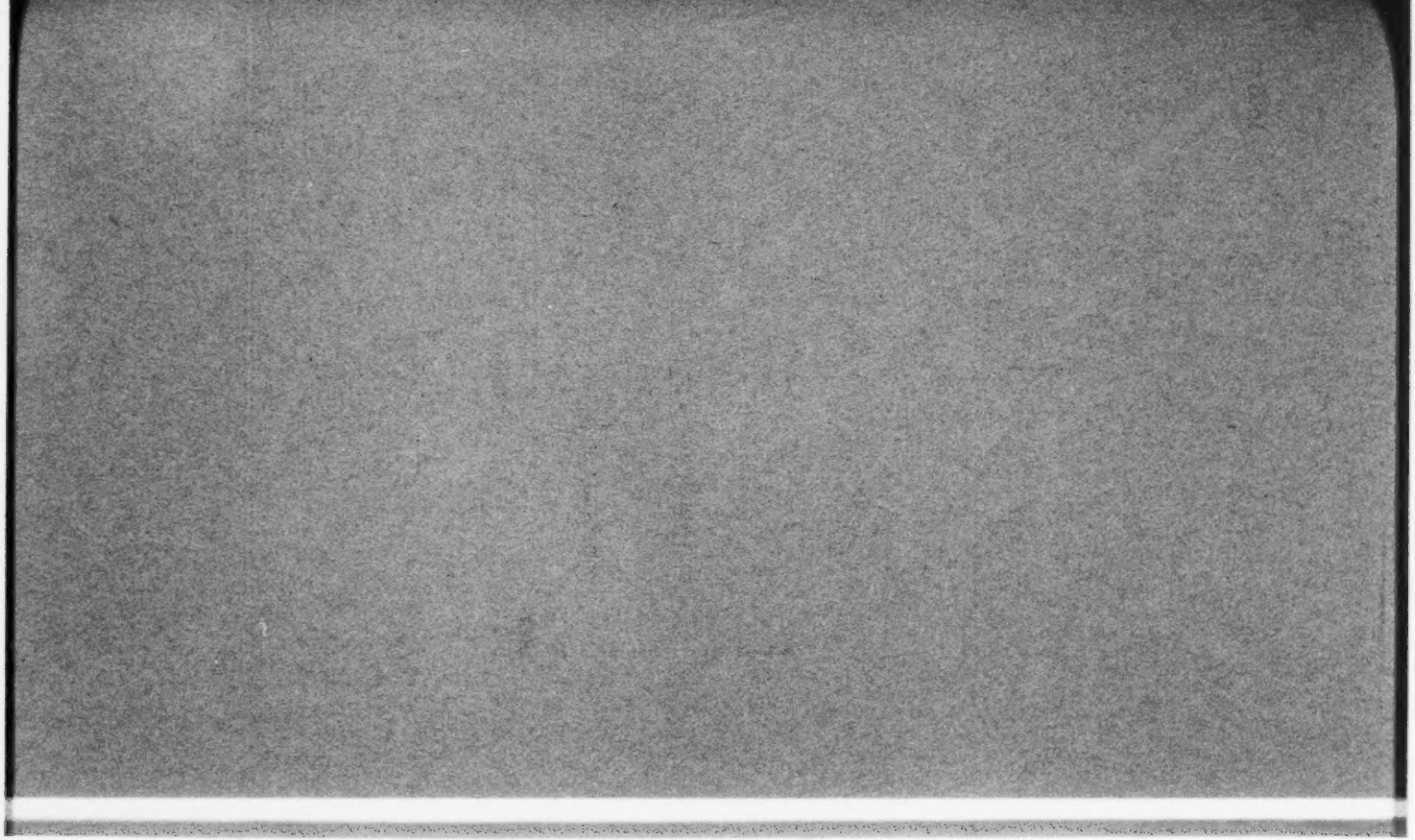
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 343

CLARENCE J. THOMPSON,

vs. *Petitioner,*

THE STATE OF GEORGIA.

PETITION FOR REHEARING.

Comes now Clarence J. Thompson and presents his petition for rehearing in the above entitled cause and prays that the court reconsider its action in denying the petition of Clarence J. Thompson for the writ of certiorari, by order of the court as passed in said matter, of date, October 19, 1942, and in support thereof respectfully shows:

Part One—Prelude.

In presenting this application for rehearing, it is rather difficult to forecast the theory upon which the petition for certiorari in the instant case was denied.

The court having failed to write an opinion, it is only possible for counsel to suggest to the court some of the pertinent facts which the court evidently overlooked and also suggest the possibility of its having overlooked what

we most earnestly contend—controlling decisions, statutes and provisions of the Constitution of the State of Georgia, and of the United States as applicable.

1st.

We contend that a citizen of the United States has been placed in jeopardy a second time for the same offense.

2nd.

We contend that for the first time in the history of our system of criminal procedure, a court of last resort has entertained and granted the state the right of appeal from one of its own decisions, in contravention of express provisions of the Constitution of the United States, hereinafter specifically set forth.

Part Two.

Specific reference to parts of the record to which the Court's attention is called:

Thompson, the petitioner, was indicted by a grand jury and charged with an offense made penal by the laws of the State of Georgia (R. 7 to 12).

Before arraignment and before waiver of arraignment and before plea, Thompson filed his demurrer to the indictment (R. 12).

The demurrer was by the court overruled (R. 17).

Exceptions pendente lite were filed to the order of the Court overruling the demurrer (R. 17).

Thompson, after the order overruling the demurrer, waived arraignment and entered plea of not guilty (R. 12).

The case proceeded to trial and Thompson was found guilty of the offense as charged (R. 19).

The defendant was sentenced to penal servitude (R. 19).

And Thompson was placed in jeopardy the first time.

Thereafter Thompson filed his motion for new trial and the same was by the court denied (R. 18 & R. 22).

A writ of error was filed, excepting to this order of the court overruling the motion for new trial and assigning error upon exceptions pendente lite to the order of the court overruling the demurrer of Thompson and the case was appealed to the Court of Appeals of the State of Georgia (R. 1 to 6).

The Court of Appeals of Georgia rendered its decision and Reversed the judgment of the lower court, because the court erred in not quashing the indictment (R. 22).

We contend that this judgment of the Court of Appeals in reversing the judgment of the lower court because the court erred in not quashing the indictment, was in law, an acquittal of the defendant, Thompson.

Thereafter the State filed a motion for rehearing and prayed that the Court of Appeals of Georgia reconsider its former opinion and reverse itself (R. 22-27).

Thompson filed a motion to dismiss the motion of the State for rehearing (R. 27).

Thereafter, the Court of Appeals of Georgia, upon considering the motion for rehearing, entered judgment vacating its former judgment in which the lower court had been reversed (R. 32) and on the same date entered judgment affirming the judgment of the lower court finding Thompson guilty of the offense as charged (R. 32 to 47).

And we contend that by this second judgment of the Court of Appeals of Georgia, the defendant, Thompson, was placed in jeopardy a second time for the same offense; and we most earnestly contend that the court in refusing to grant the petition for certiorari evidently overlooked these uncontradicted facts.

Part Three.

Argument and Citation of Authorities.

Being placed in jeopardy more than once is a violation, not only of the Constitution of the State of Georgia as

incorporated in Article 1, Section 1, Paragraph 8 of the Constitution of Georgia, which provides:

"No person shall be put in jeopardy of life or liberty more than once for the same offense, save only on his or her own motion for a new trial, or in the case of mistrial. (See Code of Georgia 1933, Section 2—108.)

But, is also in violation of amendment 8—article 5 of the Constitution of the United States, which provides:

"That no person be subject for the same offense, to be twice placed in jeopardy for the same offense.

Clearly, Thompson, in the instant case was placed in jeopardy when tried in the State Court upon the indictment as returned and upon a verdict being rendered in the power court (R. 19).

When the case was appealed to the Court of Appeals of Georgia, by a writ of error (R. 1 to 6) the Court of Appeals of Georgia only considered so much of the record as related to the assignment of error on exceptions pendente lite, excepting to the order of the lower court—overruling the demurrer as filed to the indictment.

For the judgment of the Court of Appeals of Georgia, in its judgment of reversal, limited its decision to the sole question as to whether the demurrer was good or bad:

The judgment of reversal being in language as follows:

"C. J. Thompson vs. The State.

Judgment Jan. 16, 1942.

This case came before the court upon a writ of error from the Superior Court of Fulton County and after argument had, it is considered and adjudged that the judgment of the court below be reversed, because the court erred in not quashing the indictment" (R. 22).

This judgment of reversal was final and complete and did not consider any other issue as raised by the bill of exceptions and was an acquittal for Thompson.

This court has repeatedly held that a judgment sustaining the demurrer and quashing the indictment in a criminal case amounts in law to an acquittal.

Petitioner calls the Court's especial attention to this contention: The case of:

Keifer v. *The United States*

reported in 195th U. S. Reports, page 128 *et sequa*, wherein on page 130, the court holds:

> "It is then the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered although no judgment be entered on the verdict."

The judgment of the Court of Appeals of Georgia in reversing the judgment of the lower court because the lower court erred in not quashing the indictment was an end to the case and the defendant was acquitted and the Sovereign State lost jurisdiction.

It was not necessary for the mandate of the Court of Appeals of Georgia to be transmitted to the lower court for the completion of the record, and the defendant, Thompson, stood, in law in the same position as if his demurrer had been sustained in the lower court.

When the Court of Appeals of Georgia entertained a motion on the part of the State for a rehearing (R. 22) and entered a judgment reversing its former judgment (R. 32-41) and affirmed the judgment of the lower court finding Thompson guilty, unquestionably placed the defendant in jeopardy a second time in controvention of and in violation of the Constitution of the State of Georgia and the provision of the Constitution of the United States as set out, and this decision of itself, raised a *Federal* issue.

But, says the State in its brief on file in the instant case that Thompson did not invoke protection under either State

or Federal Constitution when the case was before the Court of Appeals.

In reply to this contention, we can say with absolute confidence that up to the time at which the Court of Appeals of Georgia rendered the decision of April 3, 1942 (Record 32) that there were no constitutional questions involved.

The first invasion of constitutional right was in the decision of the Court of Appeals of date April 3, 1942, which is the decision complained of and excepted to in the petition for certiorari now being considered.

Until this decision was rendered, Thompson could not, by the wildest stretch of speculative thought, conceive of such a judicial jump.

However, Thompson moved swiftly upon the heels of the decision as rendered and made an attempt to have this adverse decision reviewed and reversed, by filing a petition for certiorari directed to the Supreme Court of Georgia (R. 40 to 60). In this petition for certiorari, Thompson assigned as error and contended in part:

First. That the Court of Appeals erred in holding and deciding that the State of Georgia could file a motion for rehearing in a criminal case, which has been decided against the State and in denying the motion of petitioner to dismiss the motion for rehearing by the State of Georgia (R. 54).

Second. That the judgment of the Court of Appeals was in contravention of Article 1—Paragraph 8 of the Constitution of Georgia, which provides: "No person shall be put in jeopardy more than once for the same offense."

The petition for certiorari presented to the Supreme Court of Georgia was denied—there was no opinion (R. 49).

Thereafter Thompson filed a motion for rehearing in the Supreme Court of Georgia and this motion for rehearing

was denied (R. 60). And still, there was no opinion by the court.

Thompson exhausted all efforts available in an attempt to have the courts of last resort in the State of Georgia to review:

And Thompson comes now to the Supreme Court of the United States by petition for certiorari and at the first available opportunity, excepts to the final judgment of the Court of Appeals of Georgia, which in and of itself involves the constitutional right of the citizen.

The effort to have the exceptions as set forth in his petition for certiorari in the Supreme Court of Georgia were broad enough to comply with the rule of law invoking Federal questions as a condition precedent to bringing the case to the Supreme Court of the United States by petition for certiorari.

The Supreme Court of the State of Georgia having failed to write an opinion in considering the petition for certiorari, left the judgment of the Court of Appeals as a final judgment of a court of last resort and to this decision Thompson excepted by petition for certiorari filed in the instant case and we contend that this petition for certiorari now under review raises Federal issues and Constitutional questions involving the right of the citizen within the purview of Section 237—Judicial Code (U. S. C. A. Title 28—Section 344 (B).

By the decision of the Court of Appeals of Georgia as excepted to:

Thompson was deprived of his liberty without due process of law. Thompson was placed in jeopardy a second time for the same offense, and was deprived of privileges and immunities guaranteed to him under the Constitution of the United States as set forth in Amendment 8 Article 5 of the Constitution and as guaranteed to him under the 14th Amendment of the same paper.

We again call the Court's especial attention:

That in a criminal case in which a defendant has prevailed, the State has no right of appeal.

This contention is so thoroughly supported by a long line of state and Federal decisions as constrains us, in the belief that in denying the petition for certiorari in the instant case, the Court evidently overlooked this most substantial thought.

We again call the court's especial attention to the case of: United States vs. Sanges, 144th U. S. 310.

In which it was expressly ruled that in a criminal case the Government has no right of Appeal.

We are aware that under statute law of the United States, the government is given the right to go by direct writ of error to the Supreme Court of the United States in criminal cases, wherein the demurrer relates to form or substance, in the event that the demurrer is sustained, but this right is limited to demurrer, filed to the indictment before arraignment and plea, but even under this statutory provision the defendant is given freedom on his own bail, pending the appeal.

This statutory provision does not conflict in anywise with the position taken by counsel in the instant case, but rather gives emphasis to the thought:

That under Federal law when a demurrer to an indictment is sustained the defendant stands as a matter of law, acquitted.

So, it follows as surely as night succeeds the day, that when the Court of Appeals of Georgia in the instant case, reversed the judgment of the lower court—because the court erred in not quashing the indictment, that Thompson was acquitted and the court could not again call the defendant into jeopardy at the instance of the State by a motion for rehearing.

There has never been (so far as we have been able to ascertain) a decision rendered by a court of last resort affirming the right of the State to grant a rehearing in a criminal case—in the absence of express statute conferring such authority and it is not contended that there was any statutory law in force in the State of Georgia giving such right.

Counsel for the state, in their Brief cites a wealth of cases in an effort to sustain the unusual decision as now under review, but a careful review of these cases will disclose that the only ones that deal with the exact question are from forums wherein the sovereign was granted express statutory right and these cases are not germane or helpful.

Counsel for the State in their brief devote much space in discussing the merits of the case as it is related to the guilt or innocence of the defendant, and also discuss at length as to whether the indictment was good or bad and unnecessarily encumber the record with matter not germane.

It must be borne in mind that the question as to whether the defendant was guilty or innocent is not before this court for review.

Nor is the question as to whether the indictment was good in law or bad before the court.

The sole question is whether the first decision of the Court of Appeals of Georgia reversing the lower court—because the court below erred in not quashing the indictment, could be reviewed by the State.

The decision of the Court of Appeals of Georgia as excepted to invades the sanctity and integrity of the law of criminal procedure and should not be allowed to stand even as a quasi precedent.

We feel confident that the case now submitted is of such gravity and raises issues of such concern as to justify the hope that this Court will conclude that this petition for rehearing should be granted and the petition for certiorari sanctioned.

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Certificate of Counsel.

I, Thomas Howell Scott, counsel for the above named Clarence J. Thompson, petitioner, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

This the 31st day of October, 1942.

THOMAS HOWELL SCOTT,
Counsel for Petitioner.